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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 TITO ODILON LOPEZ, ) Civil No. 12cv1941 IEG(RBB)  
12 )  
13 ) Petitioner, ) **REPORT AND RECOMMENDATION**  
14 ) **GRANTING RESPONDENT'S**  
15 ) **MOTION TO DISMISS PETITION**  
16 ) **FOR WRIT OF HABEAS CORPUS**  
17 ) **[ECF NO. 10]**  
18 )  
19 ) Respondent. )  
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16 Petitioner Tito Odilon Lopez, a state prisoner proceeding pro  
17 se and in forma pauperis, filed a Petition for Writ of Habeas  
18 Corpus [ECF No. 1, 5] pursuant to 28 U.S.C. § 2254, alleging claims  
19 of ineffective assistance of counsel and insufficiency of evidence  
20 at trial. (Pet. 6, 19,<sup>1</sup> ECF No. 1.) On December 11, 2012,  
21 Respondent filed a Notice of Motion and Motion to Dismiss Petition  
22 for Writ of Habeas Corpus and a Memorandum of Points and  
23 Authorities in Support of Motion [ECF No. 10], and a Notice of  
24 Lodgment [ECF No. 11]. Respondent moved to dismiss the Petition on  
25 the ground that it is untimely. (Resp't's Mot. Dismiss Attach. # 1  
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28 <sup>1</sup> Because Lopez's Petition is not consecutively paginated, the Court will cite to it using the page numbers assigned by the electronic case filing system.

1 Mem. P. & A. 4-7, ECF No. 10.) On January 14, 2013, Lopez filed a  
2 document entitled Traverse and Objection to the Attorney  
3 General['s] Response and Motion to Dismiss [ECF No. 12], which the  
4 Court construes as his Opposition to the Motion to Dismiss.  
5 Respondent's Reply to Petitioner's Opposition to the Motion to  
6 Dismiss [ECF No. 15] was filed on May 13, 2013.

7 The Court has reviewed the Petition, Respondent's Motion and  
8 Memorandum in Support of the Motion, Petitioner's Opposition,  
9 Respondent's Reply, and the lodgments. For the reasons expressed  
10 below, Respondent's Motion to Dismiss should be **GRANTED**.

#### 11 **I. FACTUAL AND PROCEDURAL BACKGROUND**

12 On July 28, 2006, following a jury trial in the San Diego  
13 County Superior Court, Lopez was convicted of ten felony counts and  
14 attendant enhancements: torture in violation of California Penal  
15 Code section 206 (count one); assault and battery in violation of  
16 California Penal Code sections 240 and 242 (count two); kidnapping  
17 with the infliction of great bodily injury causing permanent  
18 paralysis in violation of California Penal Code sections 207(a),  
19 12022.7(b) and (e) (count three); forcible rape in violation of  
20 California Penal Code section 261(a)(2) (count four); forcible oral  
21 copulation with use of a deadly and dangerous weapon in violation  
22 of California Penal Code sections 288a(c), 667.61(b)(c) and (e),  
23 12022.3(a) (count five); assault by means of force likely to  
24 produce great bodily injury in violation of California Penal Code  
25 section 245(a)(1) (count six); assault with a deadly weapon in  
26 violation of California Penal Code sections 245(a)(1),  
27 1192.7(c)(23) (count seven); corporal injury to a spouse/roommate  
28 with the use of a deadly weapon in violation of California Penal

1 Code section 273.5(a) (count eight); corporal injury to a  
2 spouse/roommate with infliction of great bodily injury causing  
3 permanent paralysis in violation of California Penal Code sections  
4 273.5(a), 12022.7(b) and (e), 12022.9 (count nine); making a  
5 criminal threat in violation of California Penal Code section 422  
6 (count 10); and false imprisonment with use of a deadly weapon and  
7 infliction of great bodily injury causing permanent paralysis in  
8 violation of California Penal Code sections 236, 237(a),  
9 12022(b)(1), 12022.7(b) & (e), 12022.9 (count eleven). (Lodgment  
10 No. 4, People v. Lopez, No. D049356, slip op. at 1-2 (Cal. Ct. App.  
11 Feb. 5, 2008).) On August 28, 2006, the trial court sentenced  
12 Lopez to an aggregate term of thirty years, eight months to life.  
13 (Id. at 2.)

14 Petitioner appealed the judgment of conviction. (Lodgment No.  
15 1, Appellant's Opening Brief, People v. Lopez, No.D049356 (Cal. Ct.  
16 App. Mar. 9, 2007).) On February 5, 2008, the California Court of  
17 Appeal for the Fourth District, Division One, issued an unpublished  
18 opinion modifying the judgment by striking the false imprisonment  
19 charge and attendant enhancements in count eleven,<sup>2</sup> and affirming  
20 the conviction. (Lodgment No. 4, People v. Lopez, No. D049356,  
21 slip op. at 3-4, 22.) Lopez filed a petition for review with the  
22 California Supreme Court in case number S161709. (Lodgment No. 5,  
23 Petition for Review, People v. Lopez, No. S161709 (Cal. Mar. 13,  
24 2008).) On May 14, 2008, the California Supreme Court denied the  
25 petition. (Lodgment No. 6, People v. Lopez, No. S161709, order at  
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27 <sup>2</sup> Lopez argued, and the People conceded, that the false  
28 imprisonment charge in count eleven must be stricken because it was  
a lesser included offense of kidnapping in count three. (See  
Lodgment No. 4, People v. Lopez, No. D049356, slip op. at 3.)

1 1 (May 14, 2008).) Lopez did not file a petition for writ of  
2 certiorari with the United States Supreme Court. (See Pet. 3, ECF  
3 No. 1.)

4 Sometime between 2008 and June 23, 2009, Lopez collaterally  
5 challenged the judgment by filing a petition for writ of habeas  
6 corpus in the San Diego Superior Court.<sup>3</sup> (Pet. 3, ECF No. 1.)  
7 Lopez claimed that insufficient evidence supported his conviction  
8 of forcible rape in count four because the victim gave inconsistent  
9 testimony at the preliminary examination and trial. (Lodgment No.  
10 7, In re Lopez, No. HCN 1042/SCN 225017, order at 1-2 (Cal. Super.  
11 Ct. S.D. Cnty. June 23, 2009).) He also alleged his attorney was  
12 ineffective for failure to file a motion to dismiss the forcible  
13 rape charge. (Id. at 2.) The state court denied the habeas  
14 petition on June 23, 2009, on the ground that Lopez failed to raise  
15 these claims on appeal. (Id. at 2-3.)

16 On July 24, 2009, Lopez filed a habeas petition in the  
17 California Court of Appeal, raising the same two claims. (Lodgment  
18 No. 8, Lopez v. Evans, No. D055563 (Cal. Ct. App. July 24, 2009)  
19 (petition for writ of habeas corpus).) On September 23, 2009, the  
20 court of appeal denied the petition, stating that a challenge to  
21 the sufficiency of evidence is not cognizable on habeas corpus and  
22 that Lopez failed to demonstrate he would have achieved a better  
23 result but for the purported attorney error. (Lodgment No. 8, In  
24 re Lopez, No. D055563, order (Cal. Ct. App. Sept. 23, 2009).)

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27 <sup>3</sup> Lopez's state habeas petition is not part of the Court's  
28 record. Respondent submits that the San Diego County Superior  
Court has not provided a copy of that petition despite two  
requests. (See Resp't's Mot. Dismiss Attach. # 1 Mem. P. & A. 5  
n.4, ECF No. 10.)

On October 26, 2009, Lopez filed a petition for writ of habeas corpus in the California Supreme Court. (Lodgment No. 10, Lopez v. Evans, No. S177420 (Cal. Oct. 26, 2009) (petition for writ of habeas corpus).) The California Supreme Court denied Lopez's petition on April 14, 2010. (Lodgment No. 11, In re Lopez, No. S177420, order (Cal. Apr. 14, 2010).)

## II. STANDARD OF REVIEW

Lopez's Petition in this case was constructively filed on August 5, 2012.<sup>4</sup> (Pet. 30, ECF No. 1.) Because Lopez filed his Petition after April 24, 1996, it is subject to the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996. 28 U.S.C.A. § 2244 (West 2012). AEDPA sets forth the scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Id. § 2254(a); see also Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991). In 1996, Congress "worked substantial changes to the law of habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997). Amended § 2254(d) now reads:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

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<sup>4</sup> Under the mailbox rule, the Court deems petitions filed on the date Petitioner handed a petition to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 276 (1988); Campbell v. Henry, 614 F.3d 1056 (9th Cir. 2010); see also Rule 3(d) of the Rules Governing Section 2254 Cases. Although the Petition was filed on August 6, 2012, pursuant to the mailbox rule, the Court considers the Petition filed on August 5, 2012, the date Lopez signed the Petition.

1 (1) resulted in a decision that was contrary  
2 to, or involved an unreasonable application of,  
3 clearly established Federal law, as determined  
4 by the Supreme Court of the United States; or

5 (2) resulted in a decision that was based on an  
6 unreasonable determination of the facts in  
7 light of the evidence presented in the State  
8 court proceeding.

9 28 U.S.C.A. § 2254(d).

10 To present a cognizable federal habeas corpus claim, a state  
11 prisoner must allege that his conviction was obtained "in violation  
12 of the Constitution or laws or treaties of the United  
13 States." See 28 U.S.C.A. § 2254(a). Petitioner must allege that  
14 the state court violated his federal constitutional rights. See  
15 Reed v. Farley, 512 U.S. 339, 347 (1994); Hernandez, 930 F.2d at  
16 719; Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990).

17 A federal district court does "not sit as a 'super' state  
18 supreme court" with general supervisory authority over the proper  
19 application of state law. Smith v. McCotter, 786 F.2d 697, 700  
20 (5th Cir. 1986); see also Lewis v. Jeffers, 497 U.S. 764, 780  
21 (1990) (holding that federal habeas courts must respect a state  
22 court's application of state law); Jackson, 921 F.2d at 885  
23 (concluding that federal courts have no authority to review a  
24 state's application of its law). Federal courts may grant habeas  
25 relief only to correct errors of federal constitutional magnitude.  
26 Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir. 1989)  
27 (stating that federal courts are not concerned with errors of state  
28 law unless they rise to the level of a constitutional violation).

The Supreme Court, in Lockyer v. Andrade, 538 U.S. 63 (2003),  
stated that "AEDPA does not require a federal habeas court to adopt  
any one methodology in deciding the only question that matters

1 under § 2254(d)(1) – whether a state court decision is contrary to,  
 2 or involved an unreasonable application of, clearly established  
 3 Federal law.” Id. at 71 (citation omitted). In other words, a  
 4 federal court is not required to review the state court decision de  
 5 novo. Id. Rather, a federal court can proceed directly to the  
 6 reasonableness analysis under § 2254(d)(1). Id.

7 The “novelty” in § 2254(d)(1) is “the reference to ‘Federal  
 8 law, as determined by the Supreme Court of the United States.’”  
 9 Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), rev’d  
 10 on other grounds, 521 U.S. 320 (1997). Section 2254(d)(1)  
 11 “explicitly identifies only the Supreme Court as the font of  
 12 ‘clearly established’ rules.” Id. “[A] state court decision may  
 13 not be overturned on habeas corpus review, for example, because  
 14 of a conflict with Ninth Circuit-based law.” Moore, 108 F.3d at  
 15 264. “[A] writ may issue only when the state court decision is  
 16 ‘contrary to, or involved an unreasonable application of,’ an  
 17 authoritative decision of the Supreme Court.” Id.; see also Baylor  
 18 v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996); Childress v.  
 19 Johnson, 103 F.3d 1221, 1225 (5th Cir. 1997); Devin v. DeTella, 101  
 20 F.3d 1206, 1208 (7th Cir. 1996).

21 [A] state court decision is “contrary to [the Supreme  
 22 Court’s] clearly established precedent if the state court  
 23 applies a rule that contradicts the governing law set  
 24 forth in [the Court’s] cases” or “if the state court  
 25 confronts a set of facts that are materially  
 26 indistinguishable from a decision of [the] Court and  
 27 nevertheless arrives at a result different from . . .  
 28 precedent.”

29 Lockyer, 538 U.S. at 73 (quoting Williams v. Taylor, 529 U.S. 362,  
 30 405-06 (2000)). A state court unreasonably applies federal law if  
 31 its application is “objectively unreasonable,” which is “more than  
 32 [being] incorrect or erroneous.” Id. at 75.

### III. DISCUSSION

Respondent Grounds moves to dismiss Lopez's Petition as untimely, arguing that it was filed almost three years after the statute of limitations had expired. (Resp't's Mot. Dismiss Attach. # 1 Mem. P. & A. 1, ECF No. 10.) Specifically, Respondent contends that Petitioner's conviction became final on August 14, 2008, and thus the one-year statute of limitations, absent any tolling, would have expired on August 14, 2009. (Id.) Even with statutory tolling, Grounds argues that Lopez's Petition is untimely by sixteen months. (Id. at 6.)

The statute of limitations for federal habeas corpus petitions is set forth in § 2244(d), which provides in relevant part:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1).

It is appropriate to dismiss a federal petition for writ of habeas corpus with prejudice when it was not filed within the AEDPA's one-year statute of limitations. Jiminez v. Rice, 276 F.3d



1 478, 483 (9th Cir. 2001). Statute of limitations issues must be  
2 resolved before the merits of individual claims. White v.  
3 Klitzkie, 281 F.3d 920, 921-22 (9th Cir. 2002).

4 Here, the appellate court affirmed Petitioner's conviction and  
5 sentence on February 5, 2008. (Lodgment No. 4, People v. Lopez,  
6 No. D049356, slip op. at 3-4, 22.) Lopez then petitioned the  
7 California Supreme Court for review, and the court denied the  
8 petition on May 14, 2008. (Lodgment No. 6, People v. Lopez, No.  
9 S161709, order at 1.) Lopez did not file a petition for writ of  
10 certiorari with the United States Supreme Court.

11 United States Supreme Court Rule 13 provides that a petition  
12 for certiorari must be filed within ninety days of the entry of an  
13 order denying discretionary review by the state supreme court. See  
14 S. Ct. R. 13. When a habeas petitioner seeks direct review by the  
15 state's highest court but does not file a petition with the United  
16 States Supreme Court, the judgment becomes final when the  
17 prisoner's time to petition the Supreme Court expires. Bowen v.  
18 Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999).

19 Lopez's judgment became final for the purposes of AEDPA on  
20 August 14, 2008, ninety days after the California Supreme Court  
21 denied his petition for review. See id.; see also S. Ct. R. 13.  
22 Pursuant to § 2244(d), the statute of limitations for federal  
23 habeas corpus began to run on August 15, 2008, the day after the  
24 judgment became final. 28 U.S.C.A. § 2244(d)(1)(A); see Corjasso  
25 v. Ayers, 278 F.3d 874, 877 (9th Cir. 2002) (explaining that the  
26 one-year statute of limitations under AEDPA begins to run the day  
27 after the conviction becomes final). The one-year statute of  
28 limitations period would have expired on August 15, 2009. See

1 Patterson v. Stewart, 251 F.3d 1243, 1245-46 (9th Cir. 2001)  
2 (quoting Fed. R. Civ. P. 6(a)) ("In computing any amount of time  
3 prescribed or allowed . . . by any applicable statute, the day of  
4 the act, event, or default from which the designated period of time  
5 runs shall not be included."). Lopez's federal habeas petition was  
6 filed on August 5, 2012, almost twenty-eight months later. (Pet.  
7 30, ECF No. 1.) Therefore, unless he is entitled to statutory or  
8 equitable tolling, Lopez's action is barred by AEDPA's statute of  
9 limitations.

#### 10 **A. Statutory Tolling**

11 The one-year statute of limitations for the filing of a  
12 federal habeas petition is statutorily tolled while "a properly  
13 filed application for State post-conviction or other collateral  
14 review with respect to the pertinent judgment or claim is  
15 pending . . . ." 28 U.S.C.A. § 2244(d)(2). The interval between  
16 the disposition of one state petition and the filing of another may  
17 be tolled under "interval tolling." Carey v. Saffold, 536 U.S.  
18 214, 223 (2002). "[T]he AEDPA statute of limitations is tolled for  
19 'all of the time during which a state prisoner is attempting,  
20 through proper use of state court procedures, to exhaust state  
21 court remedies with regard to a particular postconviction  
22 application.'" Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999)  
23 (quoting Barnett v. Lamaster, 167 F.3d 1321, 1323 (10th Cir.  
24 1999)); see also Carey, 536 U.S. at 219-22. The statute of  
25 limitations is tolled from the time a petitioner's first state  
26 habeas petition is filed until state collateral review is  
27 concluded, but it is not tolled before the first state collateral  
28

1 challenge is filed. Thorson v. Palmer, 479 F.3d 643, 646 (9th Cir.  
2 2007) (citing Nino, 183 F.3d at 1006).

3 Respondent argues that even with statutory tolling, Lopez's  
4 Petition is untimely. (Resp't's Mot. Dismiss Attach. # 1 Mem. P. &  
5 A. 5, ECF No. 10.) As discussed earlier, Lopez's conviction became  
6 final on August 14, 2008, ninety days after the California Supreme  
7 Court denied his petition for review, and the statute began to run  
8 on August 15, 2008. The exact filing date of Lopez's state court  
9 habeas petition is unknown, however, Respondent notes that it was  
10 filed sometime before June 23, 2009, when the superior court denied  
11 the petition. (Id.; Lodgment No. 7, In re Lopez, No. HCN 1042/SCN  
12 225017 (order denying petition for writ of habeas corpus at 1-2).)  
13 The earliest date statutory tolling would apply is August 14, 2008,  
14 the day Lopez's conviction became final.

15 Even if the Court affords Petitioner the widest latitude and  
16 assumes that the limitations period was tolled from that date, this  
17 Petition is still untimely by more than a year. The California  
18 Supreme Court denied Lopez's habeas petition on April 14, 2010.  
19 (Lodgment No. 11, In re Lopez, No. S177420 (Cal. Apr. 14, 2010) 9  
20 order denying petition en banc).) Because Lopez's state collateral  
21 review became final on that day, the AEDPA statute of limitations  
22 began to run on April 15, 2010. Nino, 183 F.3d at 1006 ("[T]he  
23 statute of limitations is tolled from the time the first state  
24 habeas petition is filed until the California Supreme Court rejects  
25 the petitioner's final collateral challenge.") The limitations  
26 period is not tolled after state post-conviction proceedings are  
27 final and before federal habeas proceedings are initiated. See 28  
28 U.S.C. § 2244(d)(2). Therefore, the one-year limitations period

1 expired on April 15, 2011. Lopez did not file his federal Petition  
2 until August 5, 2012, twenty-eight months after the state court  
3 denied his last state habeas petition and sixteen months after the  
4 limitations period expired. Because he waited more than two years  
5 to file his federal habeas petition after the state collateral  
6 review of his conviction became final, Petitioner is not entitled  
7 to statutory tolling. Unless Lopez can demonstrate he is entitled  
8 to equitable tolling, his Petition is time-barred.

### 9 **B. Equitable Tolling**

10 A petitioner is entitled to equitable tolling of AEDPA's  
11 one-year statute of limitations where "'extraordinary circumstances  
12 beyond a prisoner's control made it impossible'" to file a timely  
13 petition. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003)  
14 (quoting Brambles v. Duncan, 330 F.3d 1197, 1202 (9th Cir. 2003)).  
15 Equitable tolling of the statute of limitations is appropriate when  
16 the petitioner can show "'(1) that he has been pursuing his rights  
17 diligently, and (2) that some extraordinary circumstance stood in  
18 his way'. . . ." Holland v. Florida, 560 U.S. \_\_\_, \_\_\_, 130 S. Ct.  
19 2549, 2562 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418  
20 (2005)); see also Lawrence v. Florida, 549 U.S. 327, 335 (2007);  
21 Rouse v. U.S. Dep't of State, 548 F.3d 871, 878-79 (9th Cir. 2008).  
22 A petitioner seeking application of the doctrine bears the burden  
23 of showing that it should apply to him. Lawrence v. Florida, 549  
24 U.S. at 336 (observing that a petitioner must prove the two  
25 requirements to receive equitable tolling).

26 "'[T]he threshold necessary to trigger equitable tolling  
27 [under AEDPA] is very high, lest the exceptions swallow the rule.'"  
28 Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (alteration

1 in original) (quoting United States v. Marcello, 212 F.3d 1005,  
2 1010 (7th Cir. 2000)). The failure to file a timely petition must  
3 be the result of external forces, not the result of the  
4 petitioner's lack of diligence. Miles v. Prunty, 187 F.3d 1104,  
5 1107 (9th Cir. 1999). "Determining whether equitable tolling is  
6 warranted is a 'fact-specific inquiry.'" Spitsyn, 345 F.3d at 799  
7 (quoting Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001)).

8 Respondent argues that Lopez is not entitled to equitable  
9 tolling because he did not diligently pursue his claims and he does  
10 not allege that any extraordinary circumstances beyond his control  
11 prevented a timely filing of a federal habeas petition. (Resp't's  
12 Mot. Dismiss Attach. # 1 Mem. P. & A. 7, ECF NO. 10.) In  
13 opposition, Lopez claims that he waited to file his federal  
14 petition while his state court habeas petition was pending before  
15 the California Supreme Court. (Pet'r's Traverse & Objection Att'y  
16 General['s] Resp. & Mot. Dismiss 2, ECF No. 12.) Petitioner  
17 alleges he relied on advice from "a jail attorney and other  
18 inmates" that he was required to wait for the California Supreme  
19 Court to issue a ruling before he could file his federal petition.  
20 (Id.) Lopez contends that he was eventually informed he could  
21 inquire of the status of his state habeas petition, and he did so  
22 on or about July 8, 2012. (Id.) Petitioner claims that he never  
23 received the California Supreme Court's denial of his petition  
24 until after his written inquiry to the court, and he was not aware  
25 he could have requested an update earlier. (Id. at 2-3.) Lopez  
26 attaches a copy of his request dated July 8, 2012, as well as the  
27 copy of the envelope he received from the California Supreme Court  
28 postmarked July 13, 2012. (Id. Attach. Ex. A.) Respondent replies

1 that Lopez fails to establish he exercised reasonable diligence  
2 under the circumstances because he did not take any steps to  
3 inquire about the status of his state habeas petition prior to July  
4 8, 2012. (Resp't's Reply 4, ECF No. 15.)

5 The burden is on Petitioner to show that the "extraordinary  
6 circumstances" he identified were the proximate cause of his  
7 untimeliness, rather than merely a lack of diligence on his part.  
8 Spitsyn v. Moore, 345 F.3d at 799; Stillman v. LaMarque, 319 F.3d  
9 1199, 1203 (9th Cir. 2003). A state's failure to notify a prisoner  
10 regarding a final decision in his case may support equitable  
11 tolling. Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009). But  
12 late notice, standing alone, is not sufficient, unless the  
13 petitioner acts diligently in the matter. Id.; see also Drew v.  
14 Dep't of Corr., 297 F.3d 1278, 1288 (11th Cir. 2002) (rejecting a  
15 claim of equitable tolling where a § 2255 petitioner "provided no  
16 evidence supporting his claim that he repeatedly attempted to  
17 ascertain the status of his case from the Clerk's office, a burden  
18 necessary to sustaining his claim of extraordinary  
19 circumstances.").

20 Here, Lopez filed his state habeas petition with the  
21 California Supreme Court on October 26, 2009. (Lodgment No. 10,  
22 Lopez v. Evans, No. S177420 (petition for writ of habeas corpus).)  
23 He alleges he did not receive the court's denial issued on April  
24 14, 2010, and instead waited almost three years until July 8, 2012  
25 to request a status update. (Pet'r's Traverse & Objection Att'y  
26 General['s] Resp. & Mot. Dismiss 2, ECF No. 12.) The California  
27 Supreme Court's response to his inquiry was mailed to Lopez on July  
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1 13, 2012, and Lopez filed the instant Petition on August 5, 2012.  
2 (Pet. 30, ECF No. 1.)

3 Lopez bears the burden of establishing that he is entitled to  
4 equitable tolling. Lawrence v. Florida, 549 U.S. at 336. Even if  
5 the Court accepts the late notice from the California Supreme Court  
6 as an extraordinary circumstance justifying his delay in filing the  
7 federal habeas petition, Lopez must still show he acted diligently  
8 in pursuing his claims. See Ramirez v. Yates, 571 F.3d at 997. To  
9 the extent Petitioner claims that he did not file his federal  
10 habeas petition earlier because he followed the advice from other  
11 inmates and a jailhouse lawyer, he is not entitled to equitable  
12 tolling. Lopez's lack of legal knowledge and reliance on other  
13 inmates does not excuse the lengthy delay in this case. See Ford  
14 v. Pliler, 590 F.3d 782, 789 (9th Cir. 2009) (observing that the  
15 equitable tolling "standard has never been satisfied by a  
16 petitioner's confusion or ignorance of the law alone[]"). A  
17 prisoner who relies on other inmates to assist him retains the  
18 "'personal responsibility of complying with the law.'" Chaffer v.  
19 Prosper, 592 F.3d 1046, 1049 (9th Cir. 2010) (citation omitted)  
20 (holding that reliance on another inmate to prepare and file a  
21 habeas petition did not warrant equitable tolling); Tacho v.  
22 Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988) (holding that  
23 reliance on an incompetent jailhouse lawyer does not constitute  
24 "cause" for failure to comply with a state procedural requirement).

25 A petitioner may be entitled to equitable tolling if, for  
26 example, "despite his diligence, he did not learn about the state  
27 court's disposition of his state habeas corpus petition until  
28 eighteen months after the petition had been denied." Drew, 297

1 F.3d at 1288 n.3 (discussing Knight v. Schofield, 292 F.3d 709  
2 (11th Cir. 2002)). "Attempting to ascertain the status of his  
3 petition for writ of certiorari [is] a burden necessary to  
4 sustaining Petitioner's claim of extraordinary circumstances."  
5 Belalcazar-Vallealla v. United States, No. 8:10-CV-1964-T-27TBM,  
6 2010 WL 4735950, at \*2 (M.D. Fla. Nov. 15, 2010) (citations  
7 omitted) (rejecting an equitable tolling claim in the context of a  
8 § 2255 habeas petition where petitioner waited more than two years  
9 to inquire about the status of his writ of certiorari). Lopez does  
10 not demonstrate that he was diligent in learning the status of his  
11 state habeas petition.

12       Petitioner fails to explain what steps he took to pursue his  
13 case during the thirty-two months that passed between the filing of  
14 his petition with the California Supreme Court in October of 2009  
15 and his request for an update in July of 2012. Petitioner concedes  
16 that he made no efforts to check the status of his pending case  
17 during that time. (Pet'r's Traverse & Objection Att'y General['s]  
18 Resp. & Mot. Dismiss 2, ECF No. 12.) Under these circumstances,  
19 Lopez failed to exercise due diligence, which is a prerequisite for  
20 equitable tolling of AEDPA's statute of limitations. See LaCava v.  
21 Kyler, 398 F.3d 271, 277 (3d Cir. 2005) (concluding that petitioner  
22 "did not exercise the requisite due diligence by allowing more than  
23 twenty-one months to lapse from the filing of his petition for  
24 allowance of appeal until he inquired with the Pennsylvania Supreme  
25 Court's Prothonotary's Office as to its status."); Conley v.  
26 McEwen, No. 2:11-cv-0126 LKK-DAD P, 2012 WL 2401234, at \*6 (E.D.  
27 Cal. June 25, 2012) (holding that petitioner who waited 447 days  
28 after the California Supreme Court denied habeas relief before



1 filing a federal habeas petition did not make the requisite showing  
2 of diligence to support equitable tolling of the statute of  
3 limitations). Likewise, Lopez failed to establish that he is  
4 entitled to the equitable tolling of AEDPA's statute of  
5 limitations.

6 **IV. CONCLUSION**

7 For the reasons set forth above, Respondent's Motion to  
8 Dismiss Petition for Writ of Habeas Corpus should be **GRANTED**. This  
9 Report and Recommendation will be submitted to the United States  
10 District Court Judge assigned to this case, pursuant to the  
11 provisions of 28 U.S.C. § 636(b)(1). Any party may file written  
12 objections with the Court and serve a copy on all parties on or  
13 before **July 5, 2013**. The document should be captioned "Objections  
14 to Report and Recommendation." Any reply to the objections shall  
15 be served and filed on or before **July 19, 2013**.

16 The parties are advised that failure to file objections within  
17 the specified time may waive the right to appeal the district  
18 court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir.  
19 1991).

20 **IT IS SO ORDERED.**

21 DATED: June 6, 2013

  
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Ruben B. Brooks  
United States Magistrate Judge